U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7500
(202) 693-7365 (FAX)

DATE: January 17, 2001
CASE NO.: 1999-CAA-12
2000-CAA-10
2000-CAA-11

In the Matter of

DAVID L. LEWIS
Complainant

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
Respondent

APPEARANCES: Mr. Stephen M. Kohn, Attorney
For the Complainant

Mr. David P. Guerrero, Attorney
For the Respondent

BEFORE: Richard T. Stansell-Gamm
Administrative Law Judge

RECOMMENDED DECISION AND ORDER - DISMISSAL OF COMPLAINTS BASED ON SETTLEMENT AGREEMENT

At the end of December 2000, I received a tele-faxed Joint Motion to Approve Settlement and Dismiss Complaint. In the motion, the parties indicated they have reached a complete settlement concerning all three complaints.

Complaints

Between December 1, 1998 and December 10, 1999, the Complainant filed three complaints under the employee protection provisions of the Clean Air Act ("CAA"), 42 U.S.C. 7622; the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9610;

the Solid Waste Disposal Act ("SWDA") also known as the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6971; the Toxic Substances Control Act ("TSCA"), 15 U.S.C. 2622; the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9; and, the Federal Water Pollution Control Act ("WPCA"), 33 U.S.C. § 1367.

1999-CAA-12

In the December 1, 1998 complaint that generated 1999-CAA-12, the Complainant alleged the Respondent took several actions that either adversely affected his conditions of employment or produced a hostile work environment. The alleged adverse actions, taken in reprisal for the Complainant' stated position opposing the Respondent's regulation on sludge, included the presence of an Office of Inspector General agent at a presentation by the Complainant, a Respondent's representative's briefing to representatives of the state of New Hampshire expressing views contrary to the Complainant' position, a Respondent's representative's e-mail correspondence criticizing the Complainant, and the Respondent's research conducted in Cincinnati in response to the Complainant' concerns about the sludge regulation.[1] After an investigation failed to support his assertion of discrimination, the Complainant submitted an appeal to the Office of Administrative Law Judges ("OALJ") on February 12, 1999. Following the assignment of an administrative law judge to the case, the parties began a period of extensive discovery with the goal of commencing a hearing in June 2000.

2000-CAA-10

On November 11, 1999, the Complainant submitted another complaint, which led to 2000-CAA-10, alleging retaliatory discrimination due to his publication of an article in October 1999. The Complainant believed the terms and conditions of his employment were violated because he was instructed not to contact the media without the approval of his supervisors.[2] After an investigation failed to confirm the discrimination, the Complainant appealed to the OALJ on April 3, 2000.

2000-CAA-11

On November 22, 1999 and December 10, 1999, the Complainant presented his third complaint, the subject of 2000-CAA-11, alleging that the Respondent declined to promote him because of the October 1999 article and his contact with Congress. According to the Complainant, the Respondent also interfered with his use of a program in violation of a previous settlement agreement. Following the failure

[1]In his initial complaint, the Complainant also asserted the Respondent had improperly processed his Inter-government Personal Act assignment. On July 2, 1999, counsel for the Complainant withdrew that allegation as part of the complaint.

[2]About two weeks after the November 11, 1999 complaint, the Complainant also asserted he was denied a promotion due to his activities. That allegation was treated as a separate complaint, 2000-CAA-11.

of an investigation to find discrimination, the Complainant requested a hearing with OALJ on April 13, 2000.

Procedural History

After some delay associated with the parties' discovery activities in 1999-CAA-12, Associate Chief Administrative Law Judge Thomas Burke granted the Complainant's Motion to Consolidate the three complaints for one hearing and assigned the hearing to me in June 2000. Pursuant to a Notice of Hearing, dated June 20, 2000, I set a hearing date of November 13, 2000 in Washington D.C.

On October 17, 2000, I issued an order denying the Respondent's Motion for Partial Summary Judgment relating to one complaint, 1999-CAA-12. A week later, on October 23, 2000, I granted the Complainant's Motion to Compel Discovery. And, on October 31, 2000, I issued a Protective Order to protect the privacy of one of the Respondent's employees by treating any disciplinary information about such employee as confidential. On November 7, 2000, I granted a continuance and re-scheduled the hearing for January 22, 2001. After the receiving the settlement agreement and determining the necessity for review by the Secretary of Labor ("Secretary"),[3] I indefinitely continued the case and canceled the January 22, 2001 hearing.

Settlement Agreement

In the settlement agreement, dated December 20, 2000, the parties settle all three complaints. As part of the agreement, the Complainant agrees to withdraw his complaints with prejudice and the parties agree to a dismissal of the three complaints with prejudice. The parties also request that the specific terms of the settlement agreement remain confidential consistent with the Freedom of Information Act and the Privacy Act.

Discussion

In reviewing a settlement agreement associated with complaints filed under the employee protection provisions of Federal environmental statutes, I must ensure the terms of the agreement are fair, adequate, reasonable and not against public interest. *See Macktal v. Secretary of Labor,* 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, 89-ERA-9, 89-ERA-10 (Sec'y Mar. 23, 1989) and *Heffley v. NGK*

[3]Three of the Federal environmental statutes invoked by the Complainant (CAA, SDWA, and TSCA) require the Secretary to approve settlements of whistle blower complaints. *See Beliveau v. U.S. Department of* Labor, 170 F.3d 83 (1st Cir. 1999) and *Beliveau v. Naval Undersea Warfare Center*, 1997-SDW-1, 4, and 6 (ARB Nov. 30, 2000). The Administrative Review Board ("ARB") exercises the Secretary's powers in whistle blower cases--see Secretary's Order 2-96, 61 Fed. Reg. 19,978 (1996).

Metals Inc., 89-SDW-2 (Sec'y Mar. 6, 1990).

With this standard of review in mind, I first note both parties were ably represented by counsel and the Complainant represents his understanding of the agreement's provisions and voluntary accepts the settlement. The parties also warrant that the agreement constitutes the entire, and only, settlement with respect to the Complainant's claims. *See Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7 (ARB Dec. 3, 1996).

In paragraph 5, the parties agree to keep the terms of the settlement agreement confidential. The Complainant will not disclose or discuss the contents of the agreement with any person other than his attorney, financial counselors, family members and agency employees implementing the terms of the agreement. Correspondingly, the Respondent agrees to treat the agreement under the provision of the Privacy Act, 5 U.S.C. §552 (a). This confidentiality provision generates two observations.

First, a confidentiality provision which acts as total bar against disclosure to government agencies is against public interest. *See Brown v. Holmes & Narver*, 90-ERA-26 (Sec'y May 11, 1994). However, the Secretary has interpreted confidentiality provisions similar to the one in the agreement before me as not restricting disclosure of the agreement's terms where required by law. *See Rondinelli v. Consolidated Edison Co. of New York, Inc.*, 91-CAA-3 (Sec'y Apr. 10, 1992), *Bragg v. Houston Lighting & Power Co.*, 94-ERA-38 (Sec'y June 19, 1994), and *Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7 (ARB Dec. 3, 1996). In light of these previous Secretarial decisions, I find the confidentiality provision does not function as a prohibition against lawful disclosure.

Second, the parties' submissions, including the settlement agreement, become part of the record of the case and are subject to the Freedom of Information Act ("FOIA"or "Act"), 5 U.S.C. §552 (1988). FOIA requires Federal agencies to disclose requested records unless they are exempt from disclosure under the Act. If a FOIA request is made for the settlement agreement, the U.S. Department of Labor will have to respond and decide whether to exercise its discretion to claim any applicable exemption. *See Debose v. Carolina Power and Light Co.*, 92-ERA-14 (Sec'y Feb. 7, 1994) and *Darr v. Precise Hard Chrome*, 95-CAA-6 (Sec'y May 9, 1995)..

In the agreement, the Complainant waives his right to pursue claims against the Respondent that arose prior to the document's execution. Because this promise does not affect the complainant's ability to pursue future claims and complaints, the waiver does not adversely affect public interest. *See Ryan v. Niagara Mohawk Power Corp.*, 88-ERA-7 (Sec'y Jan. 25, 1990)

The Respondent promises to pay the Complainant's attorney an amount for professional services and costs that is double the compensatory damages recovery the complainant will receive under the agreement. Although my review of a settlement does not involve the approval or disapproval of an attorney fee (*See Tinsley v. 179 South Street Venture*, 89-CAA-3 (Sec'y Aug. 3, 1989), the amount and relative proportion of the attorney fee in this case require some evaluation from a public interest perspective. In

that regard, although the Complainant's recovery is only half of the amount of his attorney's fee, the settlement recovery is still a substantial sum and represents a significant financial benefit for the Complainant. Also, the Complainant's attorney, starting in February 1999, represented his client in three separate complaints settled by this agreement. During the procedural course of these complainants, Complainant's counsel certainly conducted extensive discovery, submitted at least one motion to compel discovery, prepared a response to the Respondent's Motion for Partial Summary Judgment, and negotiated the comprehensive settlement with the Respondent's attorney. Finally, since the Secretary has approved settlement agreements with significantly greater disproportionate amounts, the sum of the attorney fee in this settlement is not necessarily out of line. *See Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y Aug. 16, 1994 and Sec'y Sep. 11, 1997) (attorney fee five times the Complainant's recovery). Consequently, I do not find a sufficient basis, relating to the monetary amounts in the settlement, for rejecting the agreement on public interest grounds.

RECOMMENDED ORDER

Upon my review of the terms of the settlement agreement, I find they are fair, adequate, reasonable and not contrary to the public interest. Accordingly the three complaints, captioned 1999-CAA-12, 2000-CAA-10, and 2000-CAA-11, are **DISMISSED** with prejudice.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Washington, D.C.